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No. 10-662

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ASWORTH, LLC (f/k/a Asworth Corporation); HTF, LLC (f/k/a HT-Forum, Inc.); and D AVIATION SERVICES, LLC (f/k/a D Aviation Services, Inc.)

Petitioners,

v.

DEPARTMENT OF REVENUE, FINANCE AND ADMINISTRATION CABINET, COMMONWEALTH OF KENTUCKY (f/k/a Revenue Cabinet, Commonwealth of Kentucky)

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

PETITION FOR REHEARING

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF CITED AUTHORITIES	ii
PETITION FOR REHEARING	1
GROUNDS FOR REHEARING	1
CONCLUSION	9

TABLE OF CITED AUTHORITIES

Page

CASES

Asworth et al. v. Dep't of Revenue,
No. 10-662 (U.S. 2010) 2, 3, 5, 7

Asworth et al. v. Dep't of Revenue,
Nos. 2007-CA-00259 & 2008-CA-000023
(Ky. App. Nov. 20, 2009), *review denied*,
No. 2009-SC-0816 (Ky. Aug. 18, 2010) 5

Bowden v. Fort Smith,
316 U.S. 584 (1942) 3

Complete Auto Transit, Inc. v. Brady,
430 U.S. 274 (1977) 4, 5

Conner v. Simler,
367 U.S. 486 (1961) 3

Florida v. Rodriguez,
461 U.S. 940 (1983) 3

Harrison Cent. Appraisal Dist. v.
Peoples Gas, Light and Coke Co.,
No. 10-896 (U.S. Dec. 30, 2010) ..... *passim*

Helvering v. Spouse,
316 U.S. 656 (1942), 318 U.S. 604 (1943) 3

Kinsella v. Krueger,
351 U.S. 470 (1956) 7

Cited Authorities

Page

Lantec Corp. v. Dep't of Revenue,
--- P.3d ---, 2011 WL 173070 (Wash. 2011) 8

Merritt v. Welsh,
104 U.S. 694 (1881) 8

Midland Cent. Appraisal Dist. v. BP Am. Prod. Co.,
282 S.W.3d 215 (Tex. App. Mar. 26, 2009) 2, 4, 6

Midland Cent. Appraisal Dist. v. BP Am. Prod. Co.,
No. 10-890 (U.S. Dec. 30, 2010) ..... *passim*

Missouri Gas Energy v. Schmidt,
234 P.3d 938 (Okla. 2008), *cert. denied*,
130 S.Ct. 1685 (2010) 4, 5

Ogden v. Saunders,
25 U.S. 213 (1827) 6

Peoples Gas, Light and Coke Co. v. Harrison Cent. Appraisal Dist.,
270 S.W.3d 208 (Tex. App. Sept. 24, 2008) 2, 4, 6

Quill Corp. v. North Dakota,
504 U.S. 298 (1992) ..... *passim*

Cited Authorities

Page

RULES

Sup. Ct. Rule 44.2 1

OTHER AUTHORITIES

United States Census Bureau, *2009 Survey of State Government Tax Collections* 6

Texas Comptroller of Public Accounts, *Window on State Government* 7

E. Gressman *et al.*, SUPREME COURT PRACTICE (9th ed. 2007) 3

Acting under Supreme Court Rule 44.2, Petitioners Asworth, LLC (f/k/a Asworth Corporation), HTF, LLC (f/k/a HT-Forum, Inc.) and D Aviation Services, LLC (f/k/a D Aviation Services, Inc.) (collectively, "Petitioners" or "Asworth") respectfully request rehearing of the Court's Order denying their Petition for a Writ of Certiorari. Such request, as demonstrated by appropriate certificate, is based on intervening circumstances of substantial effect and impact.

PETITION FOR REHEARING

Petitioners respectfully request rehearing of the Court's Order[1] dated January 24, 2011, denying the Petition for a Writ of Certiorari in this case.

GROUNDS FOR REHEARING

Central to the underlying Petition for Certiorari and this Petition for Rehearing is this Court's opinion in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). *Quill* is also central to two other Petitions for Certiorari pending before this Court which were docketed after the Petition for Certiorari herein was docketed. All three Petitions present the question whether *Quill*'s physical presence requirement is applicable to all types of state taxes (*e.g.*, income tax and ad valorem property tax) or is limited to sales and use taxes.

In *Quill*, which involved North Dakota's imposition of use tax on goods sent from out of state into North Dakota,

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1. Rehearing is requested only regarding Question 1, involving whether Kentucky violated the Commerce Clause by subjecting out-of-state taxpayers to income tax in the face of those taxpayers having no in-state physical presence.

this Court held that physical presence of a taxpayer is required to establish constitutionally sufficient nexus with the taxing state under the Commerce Clause. However, since the Court's decision in *Quill* and for nearly 20 years, states have been in conflict over whether the physical presence rule set forth in *Quill* is limited only to sales and use taxes, or is applicable to all state taxes. *See* Petition, Appendices J and K, and Reply Brief, *Asworth et al. v. Dep't of Revenue*, No. 10-662 (U.S. 2010) (evidencing the split between states concerning the application of *Quill* to taxes other than sales and use).

On March 12, 2010, in a case directly traceable to *Quill*, the Supreme Court of Texas declined review of the Texas Court of Appeals' decisions in *Peoples Gas, Light and Coke Co. v. Harrison Cent. Appraisal Dist.*, 270 S.W.3d 208 (Tex. App. Sept. 24, 2008) and *Midland Cent. Appraisal Dist. v. BP Am. Prod. Co.*, 282 S.W.3d 215 (Tex. App. Mar. 26, 2009). On October 1, 2010, the Supreme Court of Texas denied rehearing of both decisions. *See Id.*

On December 30, 2010, Harrison Central Appraisal District filed with this Court a Petition for a Writ of Certiorari to the Texas Court of Appeals of the above decision. That same day, Midland Central Appraisal District also filed a Petition for a Writ of Certiorari to the Texas Court of Appeals regarding the decision in its case.[2] *See* Docket, *Harrison Cent. Appraisal Dist. v.*

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2. To further demonstrate the significance of the issues involved in these cases, discussed *infra*, seven amicus briefs in support of Petitioners' request for certiorari have since been filed in these two actions. *See* Docket, *Harrison Cent. Appraisal Dist. v. Peoples Gas, Light and Coke Co.*, No. 10-896 (U.S. Dec. 30, 2010); Docket, *Midland Cent. Appraisal Dist. v. BP Am. Prod. Co.*, No. 10-890 (U.S. Dec. 30, 2010), *available at*: http://www.supremecourt.gov/docket/docket.aspx (last visited Feb. 18, 2011).

Peoples Gas, Light and Coke Co., No. 10-896 (U.S. Dec. 30, 2010); Docket, *Midland Cent. Appraisal Dist. v. BP Am. Prod. Co.*, No. 10-890 (U.S. Dec. 30, 2010), *available at*: http://www.supremecourt.gov/docket/docket.aspx (last visited Feb. 18, 2011).

Petitioners in the instant action filed their Petition for a Writ of Certiorari to the Kentucky Court of Appeals ("Petition") regarding a decision holding contrary to those of the Texas Court of Appeals on November 16, 2010, well before the Petitions in *Harrison Cent. Appraisal Dist. v. Peoples Gas, Light and Coke Co.*, No. 10-896 (U.S. Dec. 30, 2010) and *Midland Cent. Appraisal Dist. v. BP Am. Prod. Co.*, No. 10-890 (U.S. Dec. 30, 2010) were docketed with this Court.[3] Thus, the filing of petitions for certiorari in the Texas cases constitutes an intervening circumstance warranting rehearing of the denial of certiorari.[4]

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3. Presumably, the Court was not aware of the Texas cases at the time of its denial of certiorari in *Asworth* as the requisite filings therein have not been completed and the cases have not yet been set for conference by the Court.

4. The Court has granted rehearing in cases where the grounds for rehearing were based on a filing of a petition for certiorari in a related case or a state court decision changing applicable state law. *See Florida v. Rodriguez*, 461 U.S. 940 (1983) (granting rehearing of a denial of certiorari when the state filed a Petition for a Writ of Certiorari in a related case); *Conner v. Simler*, 367 U.S. 486 (1961) (granting rehearing of a denial of certiorari when a new state court decision changed applicable state law in a diversity case). Where the Court has granted certiorari in another case raising identical or similar issues – particularly if that case is in direct conflict with the one in which review was previously denied – this Court has even vacated its denial of certiorari *sua sponte* and granted review. *See* E. Gressman et al., SUPREME COURT PRACTICE at 821 (9th ed. 2007) (citing *Bowden v. Fort Smith*, 316 U.S. 584, [illegible] (1942); *Helvering v. Spouse*, 316 U.S. 656 (1942), 318 U.S. 604 (1943)).

Harrison Central and *Midland Central* involve Texas' imposition of ad valorem property tax on oil and gas located in the State and connected to a pipeline system for interstate transport. *See Peoples Gas, Light and Coke Co. v. Harrison Cent. Appraisal Dist.*, 270 S.W.3d at 211; *Midland Cent. Appraisal Dist. v. BP Am. Prod. Co.*, 282 S.W.3d at 218. The Texas Court of Appeals held that ad valorem property tax on oil and gas stored in the State but connected to an interstate pipeline system for out-of-state transport violated the Commerce Clause of the U.S. Constitution because the oil and gas were "in transit" in interstate commerce and because the taxpayers did not have substantial nexus (à la *Quill*) under *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). *See Peoples Gas, Light and Coke Co. v. Harrison Cent. Appraisal Dist.*, 270 S.W.3d at 218; *Midland Cent. Appraisal Dist. v. BP Am. Prod. Co.*, 282 S.W.3d at 223.

In so holding, and as noted by all related filings to date now before the Court, the Texas Court of Appeals' decisions are in direct conflict with the Oklahoma Supreme Court's decision in *Missouri Gas Energy v. Schmidt*, 234 P.3d 938 (Okla. 2008), *cert. denied*, 130 S.Ct. 1685 (2010) on the "in transit" issue, as both the Texas and Oklahoma courts employed differing Commerce Clause analyses, relevant here on how each interpreted *Quill*. This Court, in noting the importance of the issues involved herein, requested the Solicitor General's views in *Missouri Gas*. The Solicitor General asserted that the Oklahoma Supreme Court's analysis was correct.[5] *See* Brief of the United States as Amicus Curiae, *Missouri Gas*, No. 08-1458 (Jan. 26, 2010).

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5. Respectfully, the Court should similarly request the Solicitor General's opinion in the instant action – as it relates to

This conflict raises even broader concerns concerning whether the physical presence of a taxpayer is required to establish nexus in the taxing state. *See* Petition for a Writ of Certiorari at 9, *Harrison Central*, No. 10-896 (U.S. Dec. 30, 2010) ("[i]s the physical presence of the taxpayer by activities in the taxing state necessary to establish nexus?"); Petition for a Writ of Certiorari at 10, *Midland Central*, No. 10-890 (U.S. Dec. 30, 2010) ("whether a 'physical-presence' rule, which the Court has held remains applicable in analyzing Commerce Clause challenges to state *sales* and *use* taxation, *Quill*, 504 U.S. [298] at 312-14, likewise applies to ad valorem *property* taxation."). *See* Petition for a Writ of Certiorari at 25, *Asworth*, No. 10-662 (U.S. Nov. 16, 2010) ("such a shifting test, one requiring physical presence in sales and use taxes while allowing 'metaphysical presence' in income tax cases, would create unconscionable results.").

In *Asworth*, the Kentucky Court of Appeals addressed the same issue, whether taxpayers had substantial nexus under *Complete Auto* and *Quill*, but rejected this Court's physical presence requirement of *Quill*. The Kentucky Court of Appeals consequently subjected the out-of-state taxpayers to income tax even though they had no property or employee presence whatsoever in Kentucky. *See Asworth et al. v. Dep't of Revenue*, Nos. 2007-CA-00259 & 2008-CA-000023 (Ky. App. Nov. 20, 2009), *review denied*, No. 2009-SC-0816 (Ky. Aug. 18, 2010).

On the other hand, the Texas Court of Appeals applied the *Complete Auto* and *Quill* physical presence

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whether a physical presence requirement applies in the context of state taxes, other than sales and use, as the Solicitor General in *Missouri Gas did not* opine as to the *Quill* issue in any material manner.

requirement broadly as to effectively shield taxpayers *with* a presence of property – oil and gas, underground storage facilities and pipelines – in the State from ad valorem property taxation. *See Harrison Central*, 270 S.W.3d 208 (Tex. App. Sept. 24, 2008); *Midland Central*, 282 S.W.3d 215 (Tex. App. Mar. 26, 2009).

These cases are completely at odds with each other, and, simply put, result in a direct and current conflict. The Texas courts have held in favor of the taxpayers, applying a *Quill* physical presence analysis outside of the sales and use tax arena to ad valorem property taxation; the Kentucky court has held in favor of the State, limiting *Quill*'s physical presence analysis to sales and use taxes, and expressly rejecting its application to income taxes. As Chief Justice John Marshall described, "That may be very clear to one intellect, which is far from being so to another." *Ogden v. Saunders*, 25 U.S. 213, 339 (1827). The Court's denial of rehearing in *Asworth* would leave in place an opinion in direct conflict with *Harrison Central* and *Midland Central*, one which is patently irreconcilable.

No different than with sales and use taxation and its fiscal significance, of critical importance to states and businesses is whether the *Quill* physical presence requirement applies in the context of income and property taxes, given that these three types of taxes are generally the main sources of revenue for states. Significantly, income tax is Kentucky's second greatest source of revenue (37.9%), behind only sales and use tax (47.8%). *See* United States Census Bureau, *2009 Survey of State Government Tax Collections*, *available at*: http://www.census.gov/govs/statetax/0918kystax.html (last visited Feb. 18, 2011). Ad valorem property tax is Texas' greatest source of revenue (47.8%), and sales and use tax is its second (32.1%). *See*

Texas Comptroller of Public Accounts, *Window on State Government*, *at*: http://www.window.state.tx.us.taxinfo/proptax/annual09/ch01.html (last visited Feb. 18, 2011). Thus, the magnitude of whether *Quill*'s physical presence requirement applies for taxpayers (in Texas) or does not apply (in Kentucky) is enormous, has a wide-ranging effect upon the majority of taxpayers of each state and is largely determinative of each state's budget. Further, it would be illogical to have one standard for sales and use tax and another for all other state taxes throughout the Country, including income and property taxes.

Asworth, *Harrison Central* and *Midland Central* are all currently pending before this Court. It does not appear that multiple Petitions for Certiorari raising the question of the proper application of *Quill* have been pending before the Court at the same time since *Quill* was decided in 1992; similarly, never before have such pending Petitions been in direct conflict as to its application.

This is a perfect storm, which not only demonstrates the importance of this issue, but presents the first opportunity in 20 years for this Court to address whether physical presence/*Quill* applies to all state taxes (in particular, to income and ad valorem property taxes, or is limited to sales and use taxes) by reference to simultaneously presented conflicting decisions involving two different taxes in two different states. As Justice Frankfurter noted in *Kinsella v. Krueger*, 351 U.S. 470, 485 (1956), "[r]eflection is a slow process. Wisdom, like good wine, requires maturing." As nearly 20 years have passed since the Court's decision in *Quill*, the Court's wisdom is now needed as to how *Quill* should be applied today.

This Court's review of whether a State violates the Commerce Clause by subjecting taxpayers to state tax when the taxpayers have no physical presence in the State should be addressed at this time because the states are in chaos over the unsettled nature of the law post-*Quill*.[6] This Court recognized generations ago that "[u]ncertainty and ambiguity are the bane of commerce." *Merritt v. Welsh*, 104 U.S. 694, 702 (1881). The framers of the U.S. Constitution intended that the Commerce Clause have the same meaning in Kentucky as it does in Texas, and among all states. This Court should grant review of Asworth's Petition to clarify the scope of *Quill*'s physical presence requirement and provide nationwide uniformity for the application of the Commerce Clause.

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6. This chaotic state of affairs is demonstrated by yet another *Quill*-like case, a decision issued by the Supreme Court of Washington only weeks ago, on January 20, 2011. *See Lamtec Corp. v. Dep't of Revenue*, --- P.3d ---, 2011 WL 173070 (Wash. 2011).

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant their Petition for Rehearing and Petition for a Writ of Certiorari.[7]

Respectfully submitted,

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7. Alternatively, Petitioners respectfully request that the Court hold this Petition in abeyance pending the Court's decisions as to whether to grant or deny Certiorari in *Harrison Central* and *Midland Central* or issue a "Grant, Vacate and Remand" Order to the Supreme Court of Kentucky.

CERTIFICATE OF GOOD FAITH

The undersigned hereby certifies that this petition for rehearing is restricted to the grounds specified in Rule 44.2 of the Rules of the Supreme Court and is presented in good faith and not for delay.